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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 25)
of the Cable Television Consumer)
Protection and Competition Act)
of 1992)

MM Docket No. 93-25

Direct Broadcast Satellite)
Public Service Obligations)

To: The Commission

COMMENTS OF RESEARCH TV

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SUMMARY

When Congress enacted the DBS "set-aside" provision in 1992, the future of the DBS industry was unclear at best. Today, DBS is a multi-billion dollar industry dominated by some of the nation's largest communications conglomerates. Estimates are that the DBS industry will grow to around 15 million subscribers by the year 2000. DBS dishes have already become the fastest selling consumer electronics device in history.

Congress' objective in enacting Section 25 was to ensure that the American public receives a broad array of noncommercial educational programming from DBS operators that profit from scarce public resources. By establishing a range of channel set-aside and access price options, Congress afforded the Federal Communications Commission ("Commission") the ability to tailor its Section 25 regulations to conform to market realities. In light of the enormous vitality of the DBS industry today -- both in absolute terms and relative to that of noncommercial educational programmers -- the Commission should implement Section 25 in a manner that will ensure noncommercial educational programmers the fullest possible access to DBS systems. Such an approach also is consistent with current national policy priorities of promoting the development of this country's educational resources.

Specifically, the Commission should: (i) require each DBS operator to set aside a block of channels which are equal to

seven percent of its total channel capacity and which are received by at least 75 percent of the system's subscribers; (ii) permit noncommercial educational programmers -- at least those that are nonprofit entities and those that receive Federal funding in support of their programming -- to gain access to such capacity without payment of any fee to DBS operators; (iii) require the reservation of separate, discrete blocks of channel capacity for each of the three categories of noncommercial educational programmers identified in Section 25; (iv) guarantee one-third of reserved channel capacity for access by educational institutions; (v) define educational institutions to include only accredited educational institutions and entities comprised exclusively of, or controlled exclusively by, accredited educational institutions; (vi) ensure that three discrete categories of accredited educational institutions (K-12 institutions, research universities and other post-secondary educational institutions) have equal access to the reserved channels set aside for accredited educational institutions; and (vii) appoint an accredited educational institutions committee to establish reasonable procedures for the allocation of Section 25 channels among accredited educational institutions where demand exceeds the number of available Section 25 channels.

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Research TV submits the following comments in response to
the Notice released January 31, 1997.

BACKGROUND

A. Section 25 of the 1992 Cable Act

In 1992 Congress enacted the Cable Television Consumer
Protection and Competition Act of 1992, Pub. L. No. 102-385
("1992 Cable Act" or "Act"). A fundamental purpose of the Act
is to "promote the availability to the public of a diversity of
views and information through cable television and other video
distribution media." 1992 Cable Act § 2(b)(1). Section 25 of
the 1992 Cable Act ("Section 25") helps further that

Congressional objective by ensuring that the American viewing public has widespread access to noncommercial educational programming via Direct Broadcast Satellite ("DBS").

Section 25 requires that each DBS operator set aside from four to seven percent of its channel capacity "exclusively for noncommercial programming of an educational or informational nature." 47 U.S.C. § 335(b)(1) (1994). A DBS provider satisfies this requirement by "making channel capacity available to "national educational programming suppliers." 47 U.S.C. §335(b)(3).

Section 25 identifies three specific categories of "national educational programming suppliers:"

(1) "noncommercial educational television stations;" (2) "other public telecommunications entities;" and (3) "public or private educational institutions." 47 U.S.C. § 335(b)(5)(B). DBS operators are required to afford access to these entities on "reasonable prices, terms and conditions," as determined by the Commission. 47 U.S.C. § 335(b)(3). In making that determination, the Commission must take account of the "nonprofit character of the programming provider and any Federal funds used to support such programming." 47 U.S.C. § 335(b)(4)(A). In addition, the Commission may not permit any price to "exceed, for any channel made available under this subsection, 50 percent of the total direct costs of making such channel available." 47 U.S.C. § 335(b)(4)(B).

Section 25 is consistent with longstanding Congressional policy which recognizes the value of noncommercial educational programming and the economic difficulties inherent in the provision of such programming. As Congress has concluded, "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal." H.R. Rep. No. 572, 90th Cong., 1st Sess. at 10-11 (1967) (adopted in conjunction with the Public Broadcasting Act, Pub L. 90-129, 81 Stat. 365 (1967)).

The Commission issued a Notice of Proposed Rulemaking in 1993 seeking comment on how Section 25 should be implemented. In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 1589 (1993). Following receipt of those comments, the United States District Court for the District of Columbia struck down Section 25 as unconstitutional. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993). The ruling effectively froze the Commission's rulemaking pending the Commission's appeal of the decision. On August 30, 1996 the United States Court of Appeals for the District of Columbia Circuit reversed the District Court and held that Section 25 is constitutional. Time Warner Entertainment Co., L.P. v. FCC, 93 F.3d 957 (D.C. Cir. 1996), rehearing denied, 105 F.3d 723 (1997).

The instant proceeding was initiated by Public Notice dated January 31, 1997. Public Notice, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations Comments Sought in DBS Public Interest Rulemaking, FCC 97-24, 1997 WL 35311 (rel. Jan. 31, 1997). Its purpose is to update the record in the 1993 Section 25 rulemaking proceeding.

B. Research TV

Research TV is a collaboration founded by a core group of accredited research universities. It is currently coordinated by the University of Washington. Its founding members include Duke University, Princeton University, Stanford University, the University of Alaska-Fairbanks, the University of California at Los Angeles, the University of California at San Diego, the University of Hawaii, the University of Pennsylvania, the University of Texas at Austin, and the University of Virginia.

The mission of Research TV is to promote and to provide access to research education through video-based technologies. Research TV represents an opportunity for the public, including business leaders and policymakers, to learn from the foremost scholars and experts in the United States. Industry, government, educators, students and the general public rely on research information for purposes such as: fueling the growth of business through technology transfer; ensuring that course

materials and ideas reflect the most up-to-date knowledge and theories; facilitating informed policy decisions in areas such as healthcare; and enabling the general public to benefit from current research that is supported by public tax dollars. Research TV is intended to address these diverse needs by providing a far greater range and depth of educational research programming than is available through mainstream television. Examples of programming include:

A seminar conducted by the University of Washington Social Development Research Group on effective strategies for preventing teen violence, substance misuse and teen pregnancy.

A series of lectures produced by Stanford University focusing on current national and international issues;

A symposium by the University of Washington on developing technology and methods for trapping comet particles in space in order to understand the nature of the galaxy;

Assessments by the University of Virginia of the current design and safety of automobiles through research and discussion of mechanical engineering issues and computer modeling; and

A seminar by the University of California-San Diego on designing new biotechnology business opportunities based on the results of the Human Genome Project.

More specifically, Research TV offers a means of distributing critical research information in a timely fashion -- particularly in rapidly changing and vital areas of research. Professionals in many fields from computer science to biotechnology to astronomy to electrical engineering need the

type of immediate access to research results provided by a service such as Research TV.

One example of the potential access provided by Research TV in the area of healthcare and healthcare education is illustrated by the University of Washington's WWAMI Program of Regionalized Medical Education. The University of Washington School of Medicine is responsible for the training of new physicians in the states of Wyoming, Washington, Alaska, Montana and Idaho. Medical students attend classes in Seattle but lose direct access to the continuing presentation and discussions of research results as they progress in their training to other geographic locations. Research TV provides the means by which these students and physicians may stay current on medical research developments.

Potentially even more important than providing information access for professionals, a service such as Research TV can afford the general public first-hand access to the most up-to-date information. For example, diabetics may have immediate access to primary sources of information about recent findings related to their disease as well as new treatments. Individuals interested in preventative and diagnostic information about health issues may have direct access to presentations on current research made by experts from world-renowned university medical centers. Now the public generally relies on second-hand sources such as newspaper or

television news summaries to receive such critical health-related information. Research TV provides a means of bringing this information directly to the public -- information that is often the result of government-funded research supported by public tax dollars.

Research TV presently has limited funding. Moreover, it is carried only on an experimental program-by-program basis where universities have access to local low power television stations or public, educational or governmental (PEG) channels on cable. Such a restricted distribution mechanism provides Research TV with a very limited geographic reach. Thus, Research TV, which can provide programming of national appeal and interest, is currently unable to reach the vast majority of its intended nationwide audience.

Access to DBS under Section 25 is essential if noncommercial educational programmers, such as Research TV, are to fulfill their goal of providing the American public with a diversity of high quality programming. Noncommercial educational programmers typically do not have the resources to pay DBS operators substantial amounts for access, even assuming DBS operators were willing to carry their programming under arms-length commercial terms. It is critically important that the FCC adopt access rules which ensure that viewers nationwide have access via DBS to a diverse body of quality noncommercial educational programming, including that provided by Research TV.

DISCUSSION

A. Developments Since Enactment of Section 25 Support the Fullest Possible DBS Access For Noncommercial Educational Programmers

Congress enacted Section 25 five years ago, when there was a great deal of uncertainty about the viability of the DBS industry. In 1992, the only DBS system in operation was PrimeStar's medium-power system, with a relative handful of subscribers. The Commission today knows what Congress did not know in 1992 -- that DBS is already a highly successful, multi-billion dollar industry with a bright future.

Currently, there are five DBS systems in operation (PrimeStar, EchoStar, DirecTV, USSB and AlphaStar), and a sixth (ASkyB, which will merge with EchoStar to become "Sky") is about to commence operation. Some of the largest and wealthiest conglomerates in the United States have entered the market, including AT&T, MCI, TCI, Time-Warner, News Corp. and Hughes Electronics (owned by General Motors).

Satellite home receivers are the fastest-selling consumer electronics device in history. Donald K. Dement, The DBS Revolution at 3 (National Association of Broadcasters 1996) ("Dement"). As recently as 1994 industry observers projected that DBS might reach 4.5 million households by the year 2000. Sky TRENDS Annual Report, at 4 (April 1996). Instead, the 4.5 million subscriber figure was reached by January 1997. Broadcasting and Cable, Feb. 10, 1997 at 46. From December 1994 to December 1995, DBS nearly tripled its subscribers, for an

overall growth of 275 percent. Sky TRENDS Annual Report at 4-5 (April 1996). DBS revenues are projected to reach \$7 billion by the year 2000. "MCI, News Corp. Satellite Programming Venture," Newsbytes News Network, Jan. 26, 1996.

The industry apparently shares this bullish outlook. DirecTV recently projected that it would reach 10 million subscribers by the year 2000. PrimeStar estimates it will reach 5.85 million subscribers by the same time. Sky TRENDS Annual Report at 6. EchoStar has projected that the DBS industry will grow to anywhere from 20 to 35 million subscribers by 2001. The DBS Report, Jan. 22, 1997, at 3. The News Corp., which has agreed to purchase fifty percent of EchoStar for \$1 billion, estimates that Sky will attract eight million subscribers within five years. "Cable vs. DBS -- The Sky Is Rising", Broadcasting and Cable Mar. 17, 1997 at 30. The Chief Executive of ASkyB is even more optimistic, projecting as many as 30 million customers for Sky by 2002. Los Angeles Times, Feb. 25, 1997 at D-1. AT&T recently purchased a slight 2.5 percent interest in DirecTV for approximately \$138 million.

During the same period that DBS has been developing into a highly successful industry, national policy priorities have focused to an unprecedented degree on the critical need to ensure that the American public has access to first-class educational resources. "[T]he greatest step of all...and my number one priority for the next four years is to ensure that all Americans have the best education in the world." Address by

President William J. Clinton Before a Joint Session of the Congress on the State of the Union (Feb. 4, 1997). President Clinton has recently asked Congress to earmark \$51 billion for the development of educational resources in the United States, including initiation of a national crusade for uniform educational standards, increased school construction, enhanced college scholarship programs and improved continuing adult education resources. "We must understand the significance of this endeavor ... education is a critical national security issue for our future...." Id.

In light of the robust vitality of the DBS industry and the national prioritization of developing public exposure to this country's educational resources, the Commission should vigorously implement the Congressional objectives of Section 25. It should afford noncommercial educational programmers the fullest possible access to DBS. Such access is particularly appropriate given the fact that the multi-billion dollar DBS industry holds a scarce public resource on a permanent basis; it stands to reap significant financial rewards from this public resource, and should, therefore, be obligated to provide the maximum possible amount of programming that truly serves the public interest.

B. DBS Operators Should Reserve Seven
Percent of Channel Capacity for
Access by Noncommercial Educational
Programmers

As the D.C. Circuit Court of Appeals noted, Section 25 achieves the purpose of promoting noncommercial programming "by requiring DBS providers to reserve a small portion of their channel capacity for such programs as a condition of their being allowed to use a scarce public commodity. The set-aside requirement of from four to seven percent of a provider's channel capacity is hardly onerous...." Time Warner, 93 F.3d at 976 (emphasis added). The Commission can help achieve the goal of ensuring the fullest possible access for noncommercial educational programmers by requiring reservation of the greatest amount of channel capacity permitted by the statute -- seven percent.

Congress afforded the Commission the discretion "to subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity." H.R. Rep. No. 102-862, at 100 (1992) ("Conference Report"). In 1992, the prospect of a DBS system operating with hundreds of channels was relatively remote. In fact, DBS systems now operate with around 200 channels, and systems with more than 500 channels are expected within the near future. See, e.g., The Washington Post, February 25, 1997 at D1 ("[News Corp. and Echostar] plan to sell more than 500 channels of digital television service under the

Murdoch brand name, Sky, in all 50 states beginning early next year.") A seven percent set-aside would still permit most DBS operators to program anywhere from 150 to more than 450 channels with commercial programming.

The seven percent reserved channel calculation should be made against a DBS operator's "total channel capacity." Total channel capacity should mean all of the DBS operator's channels, whether or not used; it also should encompass all channels dedicated to any kind of programming service, including addressable channels and channels devoted solely to local programming. Thus, for example, if a DBS operator has a capacity of 500 channels, 35 of these channels should be set-aside under Section 25 -- even if some of the 500 channels are used only to retransmit local broadcast stations within their local service areas.

The seven percent calculation also should be made against total channel capacity existing as of the effective date of the rules adopted in this proceeding. Furthermore, a DBS operator should be required to make additional Section 25 channels available at the same time that it increases its channel capacity -- so as to ensure that seven percent of an operator's total channel capacity existing at any time is reserved pursuant to Section 25.

The Commission should require that the seven percent set-aside be made on a specific channel-by-channel basis, rather than for segments of time spread across multiple channels. The

objectives of Section 25 cannot be achieved if noncommercial educational programming is relegated to unattractive time periods (such as late night) on a number of different channels. Viewers will not be able to identify or develop loyalty to any noncommercial educational programming service if that service is divided among a number of different channels.

Finally, the objectives of Section 25 cannot be achieved unless viewers actually receive the noncommercial educational programming provided by DBS operators. Cf. S. Rep. No. 102-92, 102d Cong., 2d Sess. at 79 (1992) ("The FCC should ensure that these [leased access] programmers are carried on channel locations that most subscribers actually use"). The channels made available by DBS operators pursuant to Section 25 should be received by at least 75 percent of the system's subscribers.

C. DBS Operators Should Not Impose
Any Fee For Access By Noncommercial
Educational Programmers

Congress established a range of from zero to fifty percent of a DBS operator's "direct costs" for providing access to noncommercial educational programmers as a "reasonable" price for access. Congress made clear that "direct costs" do not include marketing, general administrative, and similar overhead costs; nor can the DBS licensee include the revenue that it might have obtained by making the channel available to a commercial program provider. 47 U.S.C. § 335(b)(4). "Direct costs include only the costs of transmitting the signal to the

uplink facility and the direct costs of uplinking the signal to the satellite...." H.R. Rep. No. 102-628, at 125 (1992) ("House Report").

The Commission was afforded discretion to determine which, if any, of these costs may be passed on to noncommercial educational programmers. See 47 U.S.C. §§ 335(b)(3) and (4)(B). In making that determination, the Commission must take account of the "nonprofit character of the programming provider and any Federal funds used to support such programming." 47 U.S.C. §335(b)(4)(A). The Commission should further the goal of ensuring the fullest possible access to noncommercial educational programmers under Section 25 by requiring that such access be afforded without charge. At the very least, such access should be afforded free of charge to qualifying programmers that are nonprofit entities or that receive Federal funding to support their programming. (See pages 17-19 below for a discussion of which noncommercial educational programmers should qualify for Section 25 access).

Imposing costs on noncommercial educational programmers would result in a diminution of the amount and quality of programming such entities could provide. The benefits of Section 25 apply only to "noncommercial programming of an educational or informational nature." 47 U.S.C. § 335(b)(1). By definition, noncommercial educational programmers cannot generate revenue with their programming through the sale of commercial advertising time; most entities qualifying as

national educational programming suppliers are required to maintain nonprofit status. Furthermore, the net worth of the largest educational programmer is only a fraction of that of DBS licensees; a DBS operator's "direct costs" for affording access to its system would be insignificant relative to the operator's overall budget. See, e.g., "Cable vs. DBS -- The Sky Is Rising", *Broadcasting and Cable*, Mar. 17, 1997, at 41 (providing one financial analyst's estimate that Sky will have a positive cash flow of \$237 million in just its second year of operation); *Los Angeles Times*, Feb. 25, 1997 at D-1 ("Sky will...generate \$1 billion of cash flow by 2002, said Preston Padden, chief executive of ASkyB.")

DBS operators now pay for the vast majority of programming that they distribute; that programming is typically supported not only by license fees but commercials as well. In contrast, Section 25 programming will be high-quality, commercial-free programming that will be provided to DBS services free of charge. Noncommercial educational programmers should not be required to compensate DBS operators for providing public interest programming -- particularly since that programming will be used to help attract subscribers, each of whom will pay a DBS operator upwards of \$300 per year.

At the very least, noncommercial educational programming suppliers that are nonprofit entities and those receiving Federal funding to support their programming should be free of any payment obligation to DBS operators, consistent with the

directive of Section 25 that such factors be considered in determining the appropriate fee to be paid to DBS operators. Any federal assistance provided to noncommercial educational programmers is not intended, and should not be used, to compensate wealthy DBS operators to carry programming provided to those operators for free.

It would in any event be impractical for noncommercial educational programmers -- many of whom are unfamiliar with the technical aspects of DBS operations -- to monitor effectively the charges assessed by DBS operators as "direct costs." It would be burdensome for noncommercial educational programmers to verify whether "direct costs" claimed by DBS operators have in fact been borne by the operators in the amounts stated and whether such costs are in fact reasonable and properly deemed to be direct costs.

In short, noncommercial educational programmers should be permitted to devote their available funds to the development of quality programming. They should not be required to divert scarce resources to the payment of costs that are normally borne by the DBS operators themselves.

D. The Commission Should Adopt Rules Designed
 To Ensure Access By A Diverse Group of Bona
 Fide Noncommercial Educational Programmers

The Commission's Notice raises several questions as to which national educational programming suppliers are encompassed by Section 25 and how they should be accommodated on the limited

channel capacity to be afforded by DBS operators. As discussed below, the Commission should adopt rules which ensure that:

(1) National educational programming suppliers should be defined only as (i) noncommercial educational television station licensees; (ii) public telecommunications entities; and (iii) accredited public or private educational institutions;

(2) Each of these three categories of programmers should be assured a discrete portion of the total channel capacity allocated by DBS operators; for accredited educational institutions, the allocation should be one-third of each DBS operator's reserved channel capacity; and

(3) Of the channel capacity reserved for accredited educational institutions, one-third each should be set aside for accredited K-12 institutions, accredited research universities and other accredited post-secondary educational institutions.

1. The Definition of Educational Programming Supplier

Section 25 provides that the term "national educational programming supplier" includes "qualified noncommercial educational television stations," "other public telecommunications entities" and "public and private educational institutions". 47 U.S.C. § 335(b)(5)(B). The Commission should define "national educational programming supplier" to encompass these three categories of programmers only.

The term "public and private educational institutions" should in turn be defined to encompass only those institutions that are accredited by a recognized accrediting body. A requirement of accreditation -- an indicator that an institution's goals are soundly conceived, educational programs have been intelligently devised, purposes are being accomplished and that the institution is so organized, staffed and supported that it should continue to merit confidence -- is an objective means by which to ensure that only bona fide educational institutions take advantage of the Section 25 set-aside requirement.¹

Congress originally defined "national educational programming suppliers" to encompass a broader range of educational institutions, but later opted for the narrower

¹ Accreditation is a process of recognizing educational institutions for performance, integrity and quality which entitles them to the confidence of the educational community and the public. In the United States, this recognition is extended largely through nongovernmental, voluntary institutional or professional associations which have responsibility for establishing criteria, visiting and evaluating institutions, and approving those institutions which meet their criteria.

Accreditation is also formally recognized by the United States government for the purposes of determining eligibility for government assistance under certain legislation. The Secretary of Education is required to publish a list of nationally recognized accrediting agencies and associations which he/she determines to be reliable authorities as to the quality of training offered by educational institutions. Most institutions thus attain eligibility for Federal funds by holding accredited or candidate status with one of the six accrediting bodies recognized by the Secretary of Education (in addition to fulfilling other eligibility requirements).

version articulated in Section 25. In the original draft Section 25, "educational institutions" included "entities for educational, instructional or cultural purposes." S.Rep. No. 102-92, at 92 (1991). In ultimately choosing to restrict the category of educational entities entitled to access to the more formal "educational institutions," Congress evidenced a desire to ensure that the educational bona fides of such entities be unquestioned. A requirement for accreditation would help promote that objective.

Finally, the Commission should clarify that the definition of "educational institutions" includes any entity comprised, or created through a collaboration and under the exclusive control, of an accredited educational institution or institutions. This definition ensures that an entity such as Research TV, which is comprised of and controlled by accredited educational institutions exclusively, would itself be recognized as an accredited educational institution for purposes of Section 25. In contrast, entities that distribute programming created by accredited educational institutions should not be deemed to be "educational institutions" within the meaning of Section 25 -- if those entities are not owned or controlled by such institutions.

2. Channel Allocation by Programmer Category

Each of the three categories of national educational programming supplier identified in Section 25 should be assured

a specified percentage of total DBS system reserved channel capacity. For accredited educational institutions, the mandated share should be one-third of the Section 25 reserved channel capacity for each DBS system.

Allocation of a guaranteed percentage of reserved channels to each of the three categories of national educational programming suppliers identified in Section 25 ensures the availability over DBS of a range of diverse educational programming. If a DBS operator were afforded unbridled discretion to allocate reserved channels among noncommercial educational programmers, it might choose to afford access to only one type of noncommercial educational programmer. The exclusion of other types of educational programming would not promote the Congressional objective of ensuring availability of a wide range of diverse educational programming.

Allocation to accredited educational institutions of one-third of a DBS operator's reserved channels is a reasonable division of available channel capacity. Such an allocation would ensure a meaningful program distribution outlet for accredited educational institutions which, unlike noncommercial television licensees, generally have no guaranteed program distribution mechanism. A one-third allocation of channel capacity for accredited educational institutions would also help ensure that a significant portion of DBS reserved channels is used for programming of a national character. Accredited educational institutions (particularly at the post-secondary

level) are by their nature likely to produce programming of an appeal not geared to any particular geographic location. In contrast, local noncommercial television licensees and many community-based public telecommunications entities exist for the purpose of providing programming geared to the local community. In sum, provision to accredited educational institutions of access to at least one-third of reserved DBS channel capacity is a reasonable way to ensure that DBS channels are used for educational programming, of a national scope, that has no other viable means of distribution.

3. Subdivision of Educational Institutions Channels

The formal educational community in the United States recognizes that there are discrete types of educational institutions. For example, the Carnegie Foundation for the Advancement of Teaching and Learning has created a widely used classification of higher education groups according to their missions. Each of three broad categories of educational institutions recognized by that classification -- K-12 institutions; accredited research universities; and other accredited post-secondary educational institutions -- should have equal access to the Section 25 channels set aside for accredited educational institutions.

For example, if a DBS operator were required to set aside nine channels for national educational programming suppliers,